BANKRUPTCY A COMMERCIAL REGULATION.

AMONG the causes which led to the formation of the Federal Constitution, the inherent weakness of the Confederation has been usually advanced as the primary one for the establishment of a stronger central government. An examination of the causes which resulted in the formation of a nation, instead of a league, will reveal how important a part the subject of commerce played in the purposes of the framers of the Constitution. On the 21st day of January, 1786, the Legislature of Virginia passed the following resolution: —

"*Resolved*, that Edmund Randolph, James Madison, Jr., Walter Jones, St. George Tucker, and Meriwether Smith, Esquires, be appointed Commissioners, who, or any three of whom, shall meet such Commissioners as may be appointed in the other States of the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same."

Pursuant to this resolution, the Commissioners assembled at Annapolis in the following September, but delegates from five States only were present. Under the circumstances of this partial representation, the Commissioners did not deem it advisable to proceed with their commission, but resorted to a draft, framed by Alexander Hamilton, of a recommendation to the various States, a part of which was as follows: —

"In this persuasion, your Commissioners submit an opinion, that the idea of extending the powers of their Deputies to other objects than those of commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a corresponding adjustment of other parts of the Federal system."

The draft concluded with the suggestion of the Constitutional Convention, which by sanction of Congress was afterwards convened in May, 1787. In this connection the following observations of Mr. Justice Miller in his "Memorial Oration," September 17, 1887, are pertinent: —

"It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times, — that of all the agencies of civilization and progress of the human race, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the several States of the American Union to attempt, was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse, both with foreign nations and between the several States."

And again: —

"It is a matter for profound reflection by the philosophical statesman, that while the most efficient motive in bringing the other States into this convention was a desire to amend the situation in regard to trade among the States, and to secure a uniform system of commercial regulation, as necessary to the common interest and permanent harmony, the course of Rhode Island was mainly governed by the consideration that her superior advantages of location, and the possession of what was supposed to be the best harbor on the Atlantic coast, should *not* be subjected to the control of a Congress which was by that instrument expressly authorized 'to regulate commerce with foreign nations and among the several States.'"

It may therefore be truly said that just as the Zollverein was the foundation of the present German Empire, so commerce proved to be one of the corner-stones of the Constitution. To be sure the framers of the Constitution were conversant with Shays' Rebellion in Massachusetts, and in the spirit of the Preamble to the Constitution, which looks to the establishment of justice and the promotion of the general welfare, may have had in mind the regulation of the relation between debtor and creditor. At the same time, inasmuch as bankruptcy was known to be a measure primarily for the benefit of creditors, its origin is undoubtedly to be traced rather to commercial reasons than to those for the relief of the debtor class. This is apparent from the subsequently quoted remark made by Mr. Roger Sherman, who had in mind the drastic provisions of the English system, which certainly present a marked contrast to the latter-day view of many who seem to regard bank-

ruptcy as a measure for the relief of poor debtors and as a sort of eleemosynary institution.

An examination of the origin of the bankruptcy clause in the Constitution will show that this subject was akin to or closely related to commerce. It is interesting to note that the fathers of bankruptcy legislation in this country were Rutledge and the Pinckneys of South Carolina. The distinguished statesmen of South Carolina, including the Pinckneys, had visited England, where it was the custom in those days for gentlemen of fortune and family to receive their education. Both the Pinckneys and Rutledge had been trained at the Temple. Undoubtedly the two Pinckneys who were members of the Constitutional Convention had acquired an intimate knowledge of bankruptcy from the English system. A reference to Madison's "Journal of the Constitutional Convention" will show that Mr. Pinckney moved to commit Article 16, which was the "full faith and credit clause" of the Constitution, with the following proposition: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange;" thus showing that at that early date he regarded bankruptcy as a part of the law merchant, or a regulation of commerce. On September 1, 1787, Mr. Rutledge, afterwards Chief Justice, reported for the Committee which considered this subject that the provision "to establish uniform laws on the subject of bankruptcies" should be incorporated with the provision where it now stands relative to a uniform rule of naturalization. On Monday, September 3, 1787, when the subject was reached for discussion, the following observations were made: —

"Mr. (Roger) SHERMAN (of Connecticut) observed, that bankruptcies were in some cases punishable with death, by the laws of England; and he did not choose to grant a power by which that might be done here. Mr. GOUVERNEUR MORRIS said, this was an extensive and delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the United States. On the question to agree to the clause, Connecticut alone was in the negative."

Such is the history of the origin of bankruptcy in the Constitutional Convention.

In the 42d number of the "Federalist," the remarks of Mr. Madison, who took so prominent a part in the debates in the Constitutional Convention, have also a pertinent significance as to the intimate relation between bankruptcy and commerce: —

"The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question."

In this connection a brief glance at the English origin and history of the bankruptcy system (*die Urquellen*) will also show its intimate relationship to trade and commerce. Judge Taft, delivering the opinion of the Circuit Court of Appeals in the case of Leidigh Carriage Co. *v.* Stengel,[1] explains that the first bankruptcy act was passed in England during the reign of Henry VIII.; that its early provisions were confined to traders; and its original purposes were to prevent the fraudulent dealings of debtors. It is a historical fact that there also existed in England, concurrently with bankruptcy legislation, insolvent laws — the so-called "Lord's Acts," and Relief of Insolvent Debtors Acts — for the benefit of non-traders, and this was the case until the distinction between insolvency and bankruptcy was abolished in 1861, at which time the two systems, owing to the universal drift of humanitarian legislation in the abolition of imprisonment for debt, were merged. *Cessante ratione cessat ipsa lex.* The distinction between an insolvency law and a bankrupt law has been held to consist in the fact that an insolvency law did not release the effects present or future of the debtor, but only his person, and that such laws could be invoked only on voluntary petitions, while a bankruptcy law had the effect of releasing both the person of the debtor from debt and his effects.

It is a mistake to assert that bankruptcy is as old as the Romans. The *Cessio Bonorum* bears more resemblance to an insolvency law, as its effect was to release the debtor's person but not his property from execution by creditors.

Turning now to America, it may be in order, as a preliminary to the consideration of congressional legislation, to refer to the two leading cases on the subject of bankruptcy in the United States, to wit; Sturgis *v.* Crowninshield,[2] and Ogden *v.* Saunders,[3] in which opinions were rendered by Chief Justice Marshall, and which are essential to a thorough understanding of the American system of bankruptcy legislation. In Sturgis *v.* Crowninshield, the court points out the distinction between insolvency and bankruptcy laws, and in its opinion, which was delivered in 1819, speaks as follows: —

[1] 95 Fed. Rep. 637, 646. [2] 4 Wheat. 122. [3] 12 Wheat. 213.

"But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying, that the law was unconstitutional, and the commission a nullity."

In Ogden *v.* Saunders, which decided that State insolvent laws were valid but had no extra-territorial or interstate effect, the Chief Justice said: —

"Yet, when we consider the nature of our Union, that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated; it would not be matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged or entirely forbidden. . . . The power of changing the relative situation of debtor and creditor, of interfering with contracts, — a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, — had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government."

The first bankruptcy act of 1800, undoubtedly copied from the English statutes, related to *traders* only, and was passed at a time when a voluntary petition was unknown. The Act of 1841 contains the first enactment of a voluntary system, but when the quotation from the Supreme Court is borne in mind, it is to be noted that as early as 1819 the *dictum* of the Chief Justice had announced that such a voluntary provision could not be regarded as any the less a bankrupt law or unconstitutional. A reference to the "Life of Thomas H. Benton," written by President Roosevelt, will also show that Benton antagonized the passage of the Act of 1841, on the ground that it was not a bankruptcy law, but was an insolvency

law, and, therefore, unconstitutional. In this connection the dissenting opinion of Mr. Justice Catron in the case of Nelson *v.* Carland [1] affords much valuable information as to the constitutional origin of bankruptcy legislation.

Before alluding to the various theories, a word as to definition may be appropriate. The term bankruptcy, derived from *banco rotto* — a merchant whose table or counter of business is broken up — is neither euphonious nor euphemistic. The Germans have a happier designation in *Concurs* for the condition and *Concursverfahren* for the proceedings, which since 1877 have been regulated by an Imperial Code (*Concursordnung*).

Professor Richard Brown, in an excellent article on "Comparative Legislation in Bankruptcy," in the August, 1900, number of the "Journal of the Society of Comparative Legislation," asserts that three theories have been advanced as to the objects of bankruptcy legislation: —

"(1) The punishment of the fraudulent debtor; (2) the reinstatement of the unfortunate but innocent debtor; or (3) the equitable distribution of the insufficient assets among all the creditors."

Both in England and the United States there has been a great departure from the primitive theory, notwithstanding this seems to have been uppermost in the mind of Mr. Roger Sherman when the subject was discussed in the Constitutional Convention. In England the theory — one which, it is submitted, is the only sound theory — still prevails that the true functions of bankruptcy are administration and distribution. Mr. Chamberlain, who has been sometimes quoted as an opponent of bankruptcy legislation, in introducing the English Act of 1883 stated the two leading objects of bankruptcy to be "(first) the improvement of the tone of commercial morality and the promotion of honest trading, and (second) the fair and speedy distribution of the assets among the creditors whose property they are." "What is the object of a bankruptcy law?" asked the Attorney-General of England in introducing the English Bill of 1869. "The object," he answers, "is to collect the proceeds of the estates of bankrupts, and to distribute them among the creditors as fairly, cheaply, and speedily as possible."

In America, unfortunately, bankruptcy has come to be regarded as a sort of poor-debtor law, as a species of clearing house for the liquidation of debt, or, as some have expressed it, a "Hebrew Jubilee," whereby the people at intermittent periods receive eman-

[1] 1 How. 265, 280.

cipation from their debts, are rehabilitated, and the "dead wood" of the community is thereby eliminated. That the rehabilitation theory was farthest from the minds of the framers of the Constitution, it has heretofore been attempted to be shown.

It is now proposed to demonstrate that the true functions of bankruptcy are administration and distribution, and that sound statesmen and legislators in Congress have ascribed to the regulation of commerce the true reason for bankruptcy legislation. *Contemporanea expositio est optima et fortissima in lege.* This maxim that a contemporaneous interpretation is the best and most powerful in the law, is as useful in the interpretation and construction of statutes as it was in the days of Lord Coke; and it is always legitimate in seeking for the reason of legislation to consider the history of the times and the causes which operate to demand legislation. An examination, therefore, of the debates in Congress and the history and origin of our four bankruptcy acts will reveal that commerce and its regulation have been among the foremost arguments advanced by statesmen for the enactment of a system which means to the creditors administration, to the merchants a uniform system of law, and incidentally to the debtor a release from his obligations.

After the organization of the general government, the question of bankruptcy legislation became an early subject of consideration in Congress; but the measure encountered violent opposition on the part of the planter class, and so distinguished a man as Albert Gallatin opposed it in the Fifth Congress on the ground that the country, being composed largely of the agricultural element, was not adapted to it, although he admitted the principle of equality, and conceded that such a system might produce good results in the great cities. It is to be borne in mind that at this period the law governing the English system was limited to traders. James A. Bayard of Delaware, the ancestor of a distinguished family of statesmen, was an ardent champion of bankruptcy legislation at this time, and ably answered the argument of Gallatin. On January 15, 1799, Mr. Bayard spoke in the House as follows: —

> "The necessity of a bankrupt law results wherever a nation is in any considerable degree commercial. No commercial people can be well governed without it. Wherever there is an extensive commerce, extensive credits must be necessarily given."

He further spoke of the fact that such legislation prevented fraudulent speculation, and that it would be a great hardship for a merchant, losing his ships in trade, to be so situated that he could not compromise with his creditors, and asserted: —

"That England for more than two centuries and a half had been the most flourishing commercial country upon the face of the earth, owing to her civil policy, the essential part of which was the bankrupt system; and that no nation in the world has been able to extend its credit so far as Great Britain."

In the same session is to be found a remarkable speech by Harrison Gray Otis of Massachusetts, in which he shows the disadvantages arising from the chaos of different administrative laws. In the same Congress Bayard is to be found ably supported by John Marshall, who was then a member of Congress, the latter speaking in opposition to an amendment directed against the supposed *ex post facto* effect of such a law. In the roll call in favor of bankruptcy laws were included such memorable names as James A. Bayard of Delaware, Edward Livingston of New York, John Marshall of Virginia, Harrison Gray Otis of Massachusetts, James Pinckney of Maryland, John Rutledge, Jr., of South Carolina, Samuel Sewall of Massachusetts, and the Speaker, Theodore Sedgewick of Massachusetts, by whose "yea" vote the tie was broken.

After the passage of this first act, which was a purely involuntary law and limited in its scope, being intended for traders only, violent opposition to its continuance was aroused by John Randolph of Virginia, who bitterly assailed it, on the ground it was an *ex post facto* law, impaired the obligation of contracts, and was an injury to the planters of the country. To him is to be attributed its repeal. This law was not given a fair trial, and would undoubtedly have furnished general satisfaction to the mercantile classes had it not met with so untimely an end. On February 18, 1803, in the Seventh Congress, James A. Bayard spoke as follows: —

"The commercial world cannot exist without such an act. Its necessity arises from the nature of trade, and does not belong to other classes of citizens. It is founded on the principle that commerce is built on great credits; and great credits produce great debts. Owing to the risks arising from these and other circumstances, the most diligent and honorable merchant may be ruined *without committing any fault.* Not so as to the other classes of citizens; either the cultivators of the soil, the mechanics, or those who follow a liberal profession. They live on the profits of their labor, not on profits derived from credit. . . . These circumstances make a bankrupt law necessary to the merchants. The insolvent law is an ample provision for others."

And, further, he said: —

"I believe as the United States are one great commercial Republic, it behooves us to have one uniform rule coëxtensive with the Union, that the merchant in New Hampshire may know the laws of Georgia."

The subject of bankruptcy was again revived in 1815 in the Thirteenth Congress, and was pretty actively considered from that time onward. In the Fifteenth Congress, on February 25, 1818, Mr. Whitman of Massachusetts delivered a speech in which he showed the great risks incurred by merchants in trade, and that failures were occasioned by *causes beyond their control*, and emphasized the necessity of one code for merchants throughout the entire country, dwelling upon the chaos of State regulations, local preferences, and the consequent impairment of confidence, and further said: —

"The prosperity of *farmers* was dependent upon that of the *merchant*, and that fraud was encouraged by the absence of a bankruptcy law."

In a draft of a bill pending in the Seventeenth Congress is to be found the first appearance of a voluntary bankruptcy provision, which was evidently derived from the remark of the Chief Justice in the above mentioned case of Sturgis *v.* Crowninshield. At this time John Sergeant of Philadelphia appeared upon the scene as a champion, equally able with Bayard, in favor of bankruptcy legislation, and delivered speeches which completely demolished the opposition advanced in the statements of Basil Montague of England, and which adverse arguments were also effectively answered in speeches of Senator Harrison Gray Otis of Massachusetts.

The next great enemy of bankruptcy legislation to appear upon the forum of debate was James Buchanan, whose famous speech against it was delivered at this session, and who, with the assistance of Randolph's opposition, succeeded in defeating any legislation. On May 26, 1824, in the Eighteenth Congress, Daniel Webster of Massachusetts offered in the House a resolution in favor of a bankruptcy law, as opposed to "twenty-four different and clashing systems," and on March 3, 1825, spoke as follows: —

"He remained fully of opinion that, in a country so commercial, with so many States, having almost every degree and every kind of connection and intercourse among their citizens, true policy and just views of public utility required that so important a branch of commercial regulation as bankruptcy, ought to be uniform throughout all the states, and, of course, that it ought tc be established under the authority of this Government."

On December 6, 1825, President John Quincy Adams recommended the passage of a bankruptcy law in his message, and speaks of it as "an object of the deepest interest to society." Another champion of bankruptcy legislation appeared upon the scene in the Nineteenth Congress in the person of Senator Hayne of South Carolina, who on February 21, 1826, in reporting a bill, said: —

"The evils, however, resulting from the inefficient and contradictory laws now of force in the several States on this subject, were so severely felt; — such were the frauds to which they gave rise, and so great the injustice practised under them; that the committee were strongly impressed with the belief that some effectual remedy ought, at least, to be attempted."

In this bill reported by Senator Hayne were incorporated the changes of the new English (1825) Codification or Revision of the Bankruptcy laws. It was chiefly applicable to mercantile classes, but had engrafted upon it the voluntary petition for the benefit of non-traders. In this session Senator Hayne was also ably supported by Senator Berrien of Georgia.

Mr. Justice Story in his "Commentaries on the Constitution," published in 1833, remarks: —

"It is extraordinary that a commercial nation, spreading its enterprise through the whole world, and possessing such an infinitely varied internal trade, reaching almost to every cottage in the most distant States, should voluntarily surrender up a system which has elsewhere enjoyed such general favor as the best security of creditors against fraud, and the best protection of debtors against oppression."

In the Twenty-fifth Congress, Senator Thomas H. Benton of Missouri came forward as an opponent in opposition to the recommendation of President Van Buren in his message to Congress in favor of such a law. Benton's opposition, as explained by President Roosevelt, was based not so much on hostility to bankruptcy as to the nature of the Act of 1841, which he designated as an insolvency rather than a bankruptcy law. In fact, in a speech on March 4, 1840, he had spoken in favor of applying a bankruptcy law to corporations and banks. Among the advocates of the system in the Senate of the Twenty-seventh Congress are to be found the names of such distinguished statesmen as Berrien of Georgia, Rufus Choate of Massachusetts, Henry Clay of Kentucky, and Clayton of Delaware; and opposed to it such names as Richard H. Bayard of Delaware, Benton of Missouri, Buchanan of Pennsylvania, Calhoun of South Carolina, Pierce and Woodbury of New Hampshire; in the House, the names of such illustrious members

as John Quincy Adams, Caleb Cushing, and Robert C. Winthrop of Massachusetts, William P. Fessenden of Maine, and Thomas C. Chittenden of New York in favor; and that of Nathan Clifford of Maine in opposition. On July 1, 1841, President Tyler in a special message recommended the passage of a bankruptcy law. The Act of 1841, said to have been drafted by Mr. Justice Story, was the result of bargains and log-rolling, and from its inherent defects was soon repealed. At the time the Act was repealed, Senator Buchanan, on February 25, 1843, made a notable speech, recanting his views as to its unconstitutionality, and totally disagreeing with Benton's narrow views of the Constitution. It is noteworthy that in President Buchanan's message to the Thirty-fifth Congress, on December 8, 1857, he recommended the passage of a uniform bankrupt law applicable to all the banking institutions throughout the Union.

From the repeal of the Act of 1841 until the breaking out of the Civil War no bankruptcy legislation was secured. At this stage it may be stated as an interesting historical fact that the Constitution of the "Confederate States of America" also contained a clause in favor of bankruptcy legislation, with this addition, however: "But no law of Congress shall discharge any debt contracted before the passage of the same." During the period of the Civil War, Roscoe Conkling came forward as a friend of bankruptcy legislation, and on July 15, 1861, moved the appointment of a Committee of Five to report a bankruptcy law at the next session. The passage of such a law was not accomplished, however, until the Thirty-ninth Congress, when Thomas A. Jenckes of Rhode Island reported a bill, of which he was the author, and designated it as a "regulation of commerce." In this same session Senator William M. Stewart of Nevada advocated its passage on the ground of its benefit to commercial men.

The panic of 1873, which started soon after the failure of Jay Cooke, led to a discussion of the existing bankruptcy act, although up to that time no particular fault had been found with its provisions by the merchants of the country. President Grant, in his message of December 1, 1873, recommended a modification of the involuntary clause relating to the suspension of commercial paper as a ground of bankruptcy. This recommendation was followed by the passage in 1874 of a compromise amendment, which, while it materially weakened the involuntary features of the law, gave the country for the first time the very excellent provision as to composition, which marks a distinct advance in bankruptcy legis-

lation, and serves as a dignified method of settlement whereby an honest merchant overtaken by embarrassments usually beyond his control may, by the consent of a majority of his creditors, compound his debts, preserve the good-will and continuance of a business often built up by the efforts of a lifetime, and thus resume an honorable position in mercantile life. The causes which led to the repeal of this act, which had remained upon the statute books eleven years, and much longer than its two predecessors, were certain inherent defects, great delays, and extravagant fees paid to officials. An examination of the debates in the Forty-fifth Congress, which repealed the Act of 1867, still further discloses the vigorous protests against leaving a commercial nation without permanent legislation. Senator Stanley Matthews, who afterwards became a Justice of the Supreme Court, in the discussion of the repeal bill, stated: —

"The experience of the civilized world of commercial nations, and our own experience too, establishes the fact that we ought to have a bankrupt system, and that other nations have been able to maintain a stable system of jurisprudence on this subject."

Further, in the same debate, he said: —

"No more important question, none affecting the interests of the community from one end of the country to the other irrespective of sections and classes, none lying more nearly at the foundation of the public weal exists or has been considered by the Senate than this very question of a proper and efficient bankrupt system. . . . Do the Senators who are urging the immediate repeal of this act flatter themselves with the idea that when it is repealed there will no longer be frauds committed by debtors against creditors? Manifest as those frauds in my opinion have been and as often as the very provisions of the law have been made to cover a retreat for them, I nevertheless venture on the prediction that the absolute and unconditional repeal of the act will be simply uncovering the box of Pandora, and instead of the frauds that can now be enumerated and carried on in the lists of bankruptcies they will be so thick and so many that they will darken the air and you cannot count them."

In the same debate, Senator David Davis, who had been a Justice of the Supreme Court, said: —

"In a great commercial country like this a bankrupt law is an absolute necessity. With thirty-eight States of diverse insolvent proceedings a bankrupt law is an absolute necessity."

Senator John J. Ingalls, on April 15, 1878, said: —

"My own conviction has been that a great commercial people like ours was ill-adapted to exist without a bankrupt law in some form."

And, again, in the same debate, Senator Ingalls said: —

"It is an anomaly in civilization that a great commercial country like ours, with its thousands of millions of commerce, should remit to the conflicting decisions of State insolvent courts the question whether or not a debtor shall be relieved from the payment of his debts upon the surrender of all his assets."

Senator Roscoe Conkling, while yielding to the instructions of his Legislature for repeal, had hoped for the rejection of the repeal bill, and recommended the appointment of a commission to suggest perfecting amendments, and said: —

"All commercial nations in recent times have adopted, and most of them after long investigation, bankrupt acts as wise components of commercial systems. . . . The American people alone, so far as I know, among the commercial peoples of the world have bankrupt laws in spasms and ways."

Representative William P. Frye, on April 25, 1878, spoke as follows: —

"It is the constitutional duty of the Congress of the United States to enact and keep upon the statute book a bankrupt law. I hold that it is an absolute necessity to the commercial law of this land. That commercial law without it is as a man without an arm or without a leg."

No sooner, however, had the Act of 1867 been repealed in 1878 than the merchants of the country commenced the agitation for a bankruptcy law, and the so-called "Lowell Bill" was introduced into Congress as early as 1882, and in the Forty-seventh Congress Senator George F. Hoar championed it in the following language: "Commerce and manufactures know no state lines." President Arthur, in his second annual message of December 4, 1882, expressed a desire that Congress would act so as "to afford the commercial community the benefits of a national bankrupt law;" and, again, in his fourth annual message of December 1, 1884, expressed a further desire for such legislation "in view of the general and persistent demand throughout the commercial community for a national bankrupt law." On December 3, 1889, President Harrison, in his first annual message, stated "that the enactment of a national bankrupt law of a character to be a *permanent* part of our general legislation is desirable;" and in his second annual message of December 1, 1890, observed: —

"The Constitution having given to Congress jurisdiction of this subject, it should be exercised and uniform rules provided for the administration of the affairs of insolvent debtors. The inconveniences resulting

from the occasional and temporary exercise of this power by Congress, and from the conflicting State codes of insolvency which come into force intermediately should be removed by the enactment of a simple, inexpensive, and *permanent* national bankrupt law."

In the debates in the Fifty-third Congress on the "Torrey Bill," which had been first introduced in December, 1889, Representative Nelson Dingley, Jr., said: "Such legislation is a necessary incident of domestic commerce," and further explained the short duration of prior legislation as follows: —

"In the early history of this country, before interstate commerce had been developed to the extent that it has within recent years, before the construction of railroads and telegraphs and the growth of the intimate business relations now existing between every part of this country, which makes Texas commercially as near to New York and New York as near to San Francisco as Philadelphia was to Pittsburg seventy-five years ago, we can see in the development of the means of communication a reason, a necessity for national bankruptcy legislation that did not exist fifty or seventy-five years ago. We have become a great nation commercially as well as politically. Every part of this country is commercially linked with every other part. The merchant in New England is dealing every day with the merchant in New Orleans and Galveston. The merchant in St. Paul is selling to and purchasing from the merchant of Boston every day. State lines have been broken down commercially in the progress of this nation."

On April 13, 1896, Speaker Henderson, who was then Chairman of the Judiciary Committee, submitted its report and referred to the fact that China was about the only country in the civilized world which never had had a bankruptcy law, and asked in this report the pertinent question: —

"Ought the United States to be classed hereafter with England, Germany, France, and their associates having bankruptcy laws, or continue in the class with China?"

On April 5, 1897, Senator William Lindsay of Kentucky, praised the present bankruptcy act in the following language: —

"This measure is the most thoroughly analyzed piece of proposed legislation I have ever examined. Every conceivable contingency seems to have been thought out and carefully provided for. It is my judgment, that if enacted it will be a conspicuous example of matured legislation and remain for all time as an example of how laws should be prepared before being placed upon the statute books."

From the foregoing consideration of the historical and constitutional origin of bankruptcy laws, and from this view of contemporaneous congressional debates, an endeavor has been made to prove that bankruptcy, being originally designed for merchants and

traders only, and being involuntary until the two systems of bankruptcy and insolvency became merged in America in 1841 and in England in 1861, is essentially a *commercial regulation*, and that its main objects are administration or distribution, rather than the relief of the debtor. Ex-Judge Addison Brown of New York, an able bankruptcy expert, in a decision under the present act, says:

"The object of the bankruptcy act is declared to be 'to establish a uniform system of bankruptcy throughout the United States.' The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property among his creditors, and to do this by means of the agencies created by the act. That originally was its only purpose. Later, a second element has been added in the provisions for the bankrupt's discharge, upon such terms and conditions as the act may prescribe. The present act fully provides for both of these objects."

It is perfectly apparent, however, that there exists among some judges, on the floors of Congress and in the community, a fallacious and superficial view that bankruptcy legislation should partake of the nature of a "Hebrew Jubilee," and that at intermittent periods the country should have such a law for the purpose of relieving the unfortunate debtor from his burden of debt. While the humanitarian or relief features are meritorious, it should be constantly borne in mind that this principle of the law is merely an incident to its main purpose, and should not prove a menace to the *permanency* of a system intended for the perpetual benefit of merchants in general. If the "Hebrew Jubilee" idea is to prevail, the country will be confronted with successive repeals as heretofore; but as regards repeal, it is difficult to understand why a bankruptcy law should be singled out for attack. There would seem to be as much sense in asking for a repeal of the Interstate Commerce law, Patent laws, and Postal law, all of which are authorized by the same section of the Constitution, which provides for "uniform laws on the subject of bankruptcies throughout the United States." Certainly bankruptcy legislation vitally affects the interests of the commercial and debtor and creditor classes quite as much as any of these other subjects, which do not appear to invite constant attack. If, however, the administrative or distributive function of the law is made prominent, permanency and stability — both jewels in legislation — will be the result, and thus the objects of the framers of the Constitution in securing uniformity throughout the nation in this branch of commerce will be always realized.

James Monroe Olmstead.

BOSTON, April 11, 1902.